1108245 [2012] RRTA 120 (1 March 2012)

DECISION RECORD

RRT CASE NUMBER:	1108245
DIAC REFERENCE(S):	CLF2011/32620
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	John Billings
DATE:	1 March 2012
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the following directions: (i) that the second named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and (ii) that the first and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the second named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The first and third named applicants, who claim to be citizens of China (PRC), arrived in Australia on [date deleted under s.431(2) of the Migration Act 1958 as this information may identify the applicant] March 2008 and [April] 2005 respectively. The first named applicant applied to the Department of Immigration and Citizenship for a protection visa [in] March 2011. The second named applicant, who is the daughter born to her and the third named applicant, was included in the application. The third named applicant was included later, [in] July 2011. The delegate decided to refuse to grant the visas [in] August 2011 and notified the applicants of the decisions. (The first name applicant is hereinafter referred to as "the applicant", the second named applicant as "the applicant's daughter", and the third named applicant as "the applicant's partner". Collectively they are referred to as "the applicants").

3. The delegate refused the visas on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

4. The applicants applied to the Tribunal [in] August 2011 for review of the delegate's decisions.

5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 (the Regulations) for the purposes of the definition. The expression, further defined in r.1.12 of the Regulations, includes dependent child and de facto partner.

9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Regulations.

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.

12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.

16. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not

satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

17. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

21. The applicants appeared before the Tribunal [in] December 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

22. The applicants were represented in relation to the review by their registered migration agent.

23. According to information provided in the protection visa application the applicant's daughter was born on [date deleted: s.431(2)]. The applicant was aged [age deleted: s.431(2)]. The applicant's partner was aged [age deleted: s.431(2)].

24. The applicant said that she was a student in Fujian before she travelled to Australia as a student. The application indicated that her parents and a sibling reside in China and that another sibling resides in the USA.

25. Documents held on the Department's file included a copy of the applicant's daughter's birth certificate issued by the [Registry] of Births Deaths and Marriages. That named the applicant and her partner as parents. There was also a certificate of baptism bearing the applicant's name and a date in December 2010, and a certificate of membership of the same church

bearing the applicant's name and a date in June 2011. There were also photos that appeared to show the primary applicant attending a service in a church.

26. The Department's file also contained documents including a notice that it gave the applicant in April 2009 that her student visa was cancelled. This was on the basis that she had, according to the education provider, not commenced studying.

27. In a statement accompanying the application the applicant said that, as a single mother, she sought protection because she feared sanction under China's family planning laws as well as social bias towards her child. She also said that she was scared to return to China because of the lack of religious freedom and the government's "strikes and extortion" against family churches.

28. The applicant said that she grew up in a family of Buddhists so that her (Christian) beliefs brought the family a lot of troubles and she was "constantly blamed". She obtained her visa to travel to Australia in early 2007. At the end of that year one of her cousins brought her to a church and that was the first time that she had the "chance to know about Jesus" Later her cousin told her that she switched from the "patriotic Church" to the family Church. She said in effect that, although she did not know why, she felt that those involved in family churches were passionate and enjoyed their involvement and so she followed them. She said however that she could not join the gathering frequently and she had to take care of her study at school. Sometime afterwards her cousin was detained and fined by police. After her cousin was released she told the applicant that someone had reported their family church to the authorities. The applicant said that her cousin's "tragedy" made her family more upset because they were afraid that something bad might happen to her. Worrying for her safety, her family restricted her family church activities after that time. She was very interested in it, even asking for information about gatherings in secret, but she hesitated about getting involved in public.

29. In the application the applicant said that she had difficulties obtaining her passport - she paid for it.

30. After she arrived in Australia, the applicant's lifestyle changed and she developed new ideas. She began to fit in with the free and multicultural way of life where she could choose whatever she liked, especially her religion. The churches in Australia gave her confidence. Since she became involved in church in Australia she developed her spiritual life through praying and reading the Bible.

31. The applicant said that she met her partner in 2009 and gave birth to their child towards the end of the following year. Their plan to marry was rejected by her family, however. She said that her parents were fairly traditional and conservative farmers who treated marriage as a "deal", insisting that she marry someone wealthy and influential. Otherwise, it was pointless for them to send her abroad to study. Because her partner's family was not sufficiently wealthy, and because her child was female, her parents would not want to care for her (the applicant). In addition, she said that her partner could not get along with her family. His family were very superstitious and were disgusted by her family church history. Therefore the relationship ended up being hardly recognised by their families.

32. In the application the applicant said that she was in contact with relatives in China. She telephoned them sometimes.

33. The applicant said that tradition in her locality in China meant that people looked down upon women who gave birth before they were married. She said that she and her partner would be fined by the government if they returned to China. Both adult and child could not be treated fairly. The family objection to the couple marrying would place them in a more difficult and vulnerable position. They would not have access to household registration and would suffer social bias. They would not receive sympathy or support from their families. The child would have many difficulties from the point of view of education and medical treatment so that they would not have equal rights. The applicant also said that her family was once "seriously punished" by the family planning authority due to breaches and "tragedy [ran in her] memories".

Interview

34. [In] June 2011 the applicant was interviewed by the delegate with the assistance of an interpreter in the Mandarin and English languages. The Tribunal has listened to a recording of the interview and summarises the main points.

35. The applicant was tested concerning her knowledge of Christianity and demonstrated at least a basic knowledge. She confirmed during her interview that she was not present when her cousin was arrested and that the authorities in China did not ever question her about her attendance at church. The applicant said that she attended church regularly in Australia, including when she previously lived in [City 1] and then less often after she went to [City 2].

36. The applicant's relationship with her mother was strained. Her mother would not give her the financial support she needed to study. She had told the applicant to give her baby to someone else and leave her partner. She wanted her to marry the son of a work colleague. Otherwise an initial payment of 20,000 *yuan* that had been paid to her family by his family would have to be repaid. Marrying that man would effectively enable the applicant to repay what she had borrowed from her mother in order to study in Australia. She agreed when the delegate put to her that her "true reason" for not wanting to return to China was the situation with her mother and her mother's insistence that she give up her child and her partner.

37. Concerning the delay in making her application for a protection visa, the applicant said that when she was studying she did not really think about (the risk of) harm and later after she started working she thought she was not at risk. Also, her partner told her that if she applied he would be frightened and would leave her.

Submission and evidence of further pregnancy

38. Immediately before the hearing the applicant's representative provided an undated written submission to the Tribunal and a letter from the applicant's GP dated [December] 2011 stating that the applicant was nine weeks' pregnant.

Evidence given at hearing

39. The applicant confirmed in evidence that she was pregnant. She said that was unplanned.

40. The applicant told the Tribunal that her family's district in China was somewhere between an urban and a rural one. Her partner came from a rural area.

41. The applicant and her partner had lived together in Australia since before she became pregnant the first time. They had reunited after a period of separation and now intended to

remain together. In the middle of 2011 they had lived in another suburb for just over a month. Before that they lived in [suburb deleted: s.431(2)].

42. The applicant clarified that one of the photos she provided showed the pastor who signed her certificates baptising her. Another showed a slide in the church displaying the names of those baptised and the last showed her making a speech on that occasion. She brought her daughter's certificate of baptism to the hearing. That bore the date [date deleted: s.431(2)].

43. The applicant told the Tribunal that in China her family had moved from their original home to a district where there was less discrimination against girls. She was one of three girls. This was when she was four-six years old. Her mother was not always with the family so she lived with her maternal grandmother and her uncle and aunt for some of the time When her mother was overseas she gave birth to her third child. She was overseas for about 11 years. She went to many countries including the USA where the youngest was born. The applicant's father was unemployed. He did not travel with her mother. They were still married and living together now but their relationship was not harmonious.

44. The applicant said that she did not know what work her mother did but was told by her aunt that her mother worked hard to support the family in China. She worked in factories and did some sales job. She had been educated to year four level of primary school. The applicant was not sure whether her mother was permitted to leave China. She returned to China when the applicant was in the first or second year of junior high school. The sister born in the USA had spent some time in China but she was in Australia at present.

45. When the applicant's mother went overseas the second daughter, younger than the applicant, was sent to live with relatives in order to conceal the fact that she was the applicant's mother's child, but people in their village became aware and reported them so there were still fines to pay. The family actually avoided paying them because a maternal uncle tried to transfer the daughter's household registration.

46. The applicant kept in contact with the aunt and uncle who raised her. She said that her father did not care about the family and that her mother did not approve of her boyfriend. The last communication she had with her mother was after she first became pregnant. She called her mother in about May or June 2010. There had been no direct contact since then.

47. The applicant said that her parents were farmers but they did not work in the fields. They did not work for the government. They did various things. She thought that her father drove a taxi but she did not know what her mother was doing these days. Her mother's religion was Taoism. (She mentioned the connection that religion had with Buddhism, referred to in her statement as the family's religion). Her father was raised in a Christian family but he had no religion. Now her partner had the same religion as she did. He used to be a Taoist in China. She brought her partner to her church in [Suburb 3] in about December 2009 after they arrived in [City 4].

48. She knew nothing of her partner's education or any employment in China but said that she spent ten years in school there and was not ever employed. Both she and he had some jobs in Australia but now relied on the Red Cross for financial support. Their families did not support them.

49. Both the applicant's and her partner's parents knew about the relationship and about the child. Her partner's parent's attitude was that she was an unfortunate sign for their family

because of her religion. They were concerned that because of that their family would suffer. And they did not see a daughter as a good gift to the family.

50. Neither she nor her partner had sent photos of the child to family in China. Her partner's brother and sister-in-law, also from Fujian, had visited Australia and seen the child but they did not approve and strongly recommended that they send the girl away.

51. The applicant confirmed that her student visa was cancelled in 2009 although it was later on that she learned that. She knew that her partner's visa had also been cancelled but she did not know when that was.

52. The applicant said that she was attracted to Christianity because the family of her cousin, who took her to church, was a very peaceful family. They were warm and never got worked up like everyone else. That was not the family she lived with. [Ms A] was her cousin, on her father's side of the family. The applicant first accompanied that cousin to a Christian service towards the end of 2007. The first occasion was at an authorised Christian church. Later her cousin took her to different church groups - what she said were local churches. She said that by this she meant churches that were not authorised. The Chinese government regarded them as an "evil cult" The same group met at different houses. That was started by an elder who extended preaching to other areas. The elder did not commence in authorised church and did not obtain authorisation. She did not know the elder's name. Asked about her use of the term "local church", she said that this was the group that the government called Shouters. The person who established that was named Lee who died in America and another person, Nee, who died in Chinese prison. She said that she heard about this from the elders who said how the local church was established. The Tribunal asked whether there was anything distinctive about the way prayers and readings were made. She said that everyone had the chance to tell their life story and say how they felt God's power in their life. Towards the end of the hearing she said they "called the Spirit" They sat together and prayed and recited their own version of the Bible that had Lee's interpretation included.

53. Asked when she first attended church in Australia the applicant said that when she arrived she stayed in the home of [Pastor B]. A classmate from China whom she named helped her to find him. She said that the pastor was still in [City 1] at the same address. He knew that she was a practising Christian. She could not recall his denomination but she did attend his church. She said that she forgot where the church was situated but she still had her classmate's contact details and thought that she could obtain a statutory declaration from the pastor. She did not know if that church was the same denomination as the church in [Suburb 3].

54. The applicant said that she had not been baptised sooner because there was no real opportunity to be baptised before. She was a student. She moved from [City 1] to [City 2]. She said that she was "away from God" in [City 2]. Her baptism happened only when she moved to [City 4]. She lived with a Christian family who took her to church. The minister who signed her certificates performed baptism with water. This was an opportunity to be "reborn" She said there were three ways to be baptised. She had the first – to have water poured on her forehead. Another way was to get into the water. She said that, while she had never seen it, the third was to go into a river.

55. Referring to her cousin who was arrested at a family church in China the applicant said that someone paid money to secure her release. That happened at around [December] 2007. Subsequently the authorities paid special attention to that cousin. The applicant said that if

any incident was detected she would be detained for a longer time but she was not detained again because she and her associates became more cautious and went to different houses. The applicant's uncle and aunt's family (cousins of [Ms A]) went to the same group and because of government pressure, even though they did not get detained, they were on a "black list" and so ran away to the United Kingdom. To the applicant's knowledge they were recognised as refugees there. [Ms A] was still in China and continued to attend church. The applicant had maintained email contact with her. Local government officials went to her house, searched it, and "made a mess" there. That was after her detention. The applicant thought that she was reported to the authorities again who searched her house. That happened sometime after the detention – probably a couple of months afterwards, she said.

56. The other family – who went to the UK - had more severe incidents. Local officials tried to capture one of them. That uncle and aunty attended the same church. The applicant attended a gathering in their house. She heard in about October 2008 that they went to the UK. She learned more recently that they had obtained refugee status in the UK. She did not mention them in her statements to the Department or at her interview because then, although she knew that they had gone to the UK, she did not know that they had been recognised as refugees.

57. The applicant confirmed that she was not herself subject to direct questioning by authorities while in China and that she herself experienced no other relevant problems there.

58. In Australia the applicant had maintained regular attendance at the church in [Suburb 3]. She attended nearly every week, even after she moved to other suburbs of [City 4], but it became harder for her to attend after she became pregnant again, and in September 2011 she had a miscarriage that meant she stayed home for a month, and after that her daughter was ill for a time. Otherwise she would attend if the pastor could take her and sometimes the pastor came to her home to pray with her.

59. Given a statement in the application that she had difficulties obtaining travel documents before leaving China, the Tribunal asked questions about that. The applicant said that she actually had her passport for some time before she left the country. The problem was that she could not obtain senior high school registration forms from school which she needed to be able to travel to study. The school wanted to keep her there. The school wanted extra money "under the table". She said that she thought that was a different issue to the passport.

60. There was discussion about the matter put to her by the delegate at interview – that the real reason for her not wanting to return was that her mother wanted her to marry another person. The applicant said that one reason was that her mother said she should marry the other man but also that her mother wanted her to stop attending Christian gatherings. The applicant said that beyond that her reasons for not wanting to return were her religion and because her daughter had protection in Australia and that if her daughter could not attend religious gatherings she would not have her human rights. She was worried that she herself would be detained and that her daughter would suffer discrimination - from friends, from people in her home town and from government. She said that her daughter might not be able to enjoy education rights and medical care.

61. Regarding the delay between her arrival in Australia in 2008 and her application made three years later, she said that she was not aware of the procedures. She was fearful about returning to China given that her cousin had been detained. In effect she also said that she was busy because at first she did not have financial support so she had to work to cover her

expenses. She went to work and she went to school. Later she realised that she could not go to school. She did not know about things at that time.

62. Referring to her current pregnancy, the applicant said that if she had to return to China now she could be forced to have a termination because family planning laws were strict. Her paternal grandparents did not approve of her relationship with her partner. She did not have much money. The grandparents did not like the child. They said she should bring the daughter to her parents but her parents did not like the girl and wanted her "to finish the girl's life" or to send her away.

63. The applicant's partner gave evidence that was substantially consistent with the applicant's evidence regarding their relationship, the new pregnancy and his own religious conversion. He had accompanied the applicant to the church in [Suburb 3] and could say that she attended regularly unless she was ill, for instance. He mentioned that one or more pastors visited her at home.

64. The applicant's partner said that he thought that his own student visa was cancelled in 2006.

65. His family lived in a rural district and the applicant's family lived on the "urban outskirts" When he came to Australia at first his parents sent some money but that ceased because they could not afford it. His mother was unemployed and his father worked for a local Taoist group. The applicant's partner had worked as a plasterer but the Red Cross was now the couple's sole source of income.

66. He said that he wanted his child to be able to stay in Australia. He did not know what would happen to her if she was in China. For the applicant, things could get complicated for she used to participate in local church groups that were not recognised. He said that the government may come after her. There would probably be a record of her church activities. In relation to their daughter, he said their parents would not recognise the relationship. In rural areas a girl was "not precious", he said. Because they were unmarried and the applicant was underage when their daughter was born there would be a social compensation fee to pay. He was not sure how much that would be but said that he knew it would be expensive – more than 10,000 *yuan*. They could not afford to pay.

67. Both families disapproved of the situation. Even if the parents had the money to pay the fee they would not be supportive. As a Christian the applicant would continue religious practice with local church and things could get worse. Their child may experience discrimination because she was born outside marriage.

68. In response to general country information concerning her claims, the applicant said that it was not the case in her local area that a social compensation fee could be paid by instalment. She said that someone unable to pay the fee at once might be locked up for 15 days. Otherwise the authorities would come after the person's parents. She thought that the fee would be no less an amount in her area – that is that there would be no difference between urban and rural areas. She did not believe that there had been an amnesty on household registrations for members of her Han (majority) ethnic group. She could not say whether there was a right to household registration.

69. Further concerning her religion, in the context of the authorised Christian churches and whether she would attend them, the applicant remarked that the authorised church put the government first and required donations. Those attending had put their names on donation

envelopes. However, in local churches, worshippers were free to make donations or not make them. Donations made to the official church would end up in the officials' hands.

Further material submitted after hearing

70. By letter dated [January] 2012 the applicant's representatives responded to some issues raised by the Tribunal at and after the hearing. It was said there that the applicant's family in the United Kingdom had "limited contact" with the applicant and her family and so she had been unable to obtain any documentary evidence concerning their status in the United Kingdom. Secondly, due to "logistical constraints" (what that meant was not explained) imposed on him by his Church [Pastor B] could not provide a statutory declaration in support of the applicant's claims. He did however provide a letter. According to the letter, dated 19 December 2011, [Pastor B] was the pastor at [church deleted: s.431(2)]. He said that he was acquainted with the applicant. She arrived in Australia on March 2008 and lived at his house until the end of 2008. She then moved to [City 2]. During her time in [City 1] she attended the church regularly with his family. Finally, the applicant's representatives stated that her instructions were that she understood that having a child out of wedlock was against her faith but that she had never meant to fall pregnant. She would prefer to have married before having a child but it was difficult for her to marry, given that she did not have the means of support from her family to do so. She believed that God was helping her through her life and she learned from the Church to consider the child a blessing. Her Christian faith had helped her through difficult times. It was submitted that her religious beliefs should not be discounted by the fact that she had had a child out of wedlock given the lack of family support for her relationship, cultural and language barriers, financial constraints and a lack of knowledge of the process of marriage.

COUNTRY INFORMATION

Christianity and the Local Church

71. The US Department of State 2011, *2010 International Religious Freedom Report* (July-September) (www.state.gov/g/drl/rls/irf/2010_5/168351.htm) contains this information:

> "The [Chinese] constitution protects religious freedom for all citizens but, in practice, the government generally enforced other laws and policies that restrict religious freedom … Only religious groups belonging one of the five state-sanctioned 'patriotic religious associations' (Buddhist, Taoist, Muslim, Catholic and Protestant) are permitted to register and to hold worship services. Religious groups, such as Protestant groups unaffiliated with a patriotic religious association, or Catholics professing loyalty to the Vatican, are not permitted to register as legal entities."

72. According to the report, official statistics show the Protestant population to be 16 million people and that there are over 50,000 Protestant churches registered under the state-approved Three-Self Patriotic Movement. Other estimates put the number of Protestants who practise in unregistered churches at 50-70 million and the number of Protestants overall at close to 90 million. Some Protestant groups, including the "Shouters" are considered to be "evil cults".

73. The report continues that in some parts of China local authorities tacitly approve of the activities of unregistered groups and did not interfere with them but in other areas officials punished the same activities by confiscating and destroying property or imprisoning leaders and worshippers.

74. According to Human Rights Watch *World Report 2011* (www.hrw.org/en/world-report-2011/china) the Chinese government "deems all unregistered religious organizations illegal, including Protestant 'house churches,' whose members risk fines and criminal prosecution …" and Amnesty International's *Report 2011* states at page 105 that followers of unregistered or banned religious groups "risked harassment, persecution, detention and imprisonment").

75. The UK Home Office *Country of Origin Information Report* dated 24 August 2011 contains this information at paragraphs 21.03-21.06:

> "The Shouters have been targeted by China as an anti-government group since the early 1980s and were banned in 1995. [They] were targeted as a cult because their strong evangelical belief in the second coming of Christ challenged the idea of a future communist utopia."

76. The UK report quotes a report dated 4 October 2003 in which the Local Church Information Site noted:

> "The 'Local Church' of Witness Lee is a religious movement whose teachings are rooted in Biblical Christianity, but with several unique elements that have led many observers to label the group a cult. The current movement began in the 1960s in southern California, U.S.A. with the teachings of Chinese-American preacher Witness Lee, and it has since spread through much of North America and parts of Europe and Asia. Churches affiliated with the movement can usually be identified by their name, which almost always follows the pattern 'The Church in [city name]' Members typically claim that the movement has no official name, although the term 'The Lord's Recovery' is often used internally as a descriptive name. The term 'Local Church' is generally used by outsiders, and refers to the movement's belief that the church should be organized by city, and that individual churches should take the name of the city in which they are located. Other names sometimes used include 'Church of Recovery' (Philippines) and 'Shouters' (China) … Estimates of the size of the 'Local Church' hover around several hundred thousand members worldwide. However, it is difficult to produce precise numbers, largely because it is difficult to gauge the number of adherents and partial adherents to the group's teachings within mainland China itself, where the movement appears to thrive but has been driven underground by government persecution"

77. Specifically concerning Fujian province, information from sources including the Immigration and Refugee Board of Canada (CHN103500.E – *China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong* (2005 – May 2010), 30 June 2010) indicates that reports of repression of Christians in Fujian are scarce. On the other hand, President of the China Aid Association was reported as commenting that this did not necessarily mean there were fewer incidents. The President was quoted as saying that it was absolutely incorrect to find that there was religious freedom in Fujian and that house churches there faced the "constant and fearful risk" of being closed and its members punished.

National family planning policy

78. The Department of Foreign Affairs and Trade, *DFAT Report 691 – RRT Information Request CHN32173*, 31 August 2007 contains this statement:

> "The Chinese government adopted the family planning policy, which is also known as the one-child policy, in 1979 with the stated aims of easing pressure on resources and reducing [widespread] poverty. China's family planning policy is written into its Constitution as a basic state policy. The policy fundamentally consists of three elements: advocating delayed

marriage and delayed child bearing, advocating one child per couple, and allowing eligible couples to have a second child."

79. A range of reports indicates that policy has varied over time between provinces and within provinces, and especially between urban and rural areas. In relation to Fujian, DFAT made this report in 2004:

> "The Family Planning Law in Fujian is regulated by a mixture of national, provincial and local laws and rules. Enforcement is by local authorities and evidence suggests that some local governments enforce family planning rules more vigorously than others. This has created a patchwork of different rules and enforcement across the province. Family planning rules are more strictly enforced in the larger cities such as Xiamen and Fuzhou, than in the poorer countryside … In general, however, Fujian has one of the least coercive family planning regimes in China." (*DFAT Report No. 287 – RRT Information Request: CHN16609*, 22 April 2004)

Marriageable age and children born out of wedlock

80. The US Department of State 2011, *Country Reports on Human Rights Practices 2010 - China*, 8 April, Section 6 states:

> "In order to delay childbearing, the law sets the minimum marriage age for women at 20 years and for men at 22 years. It continued to be illegal in almost all provinces for a single woman to have a child, with fines levied for violations. The law states that family-planning bureaus will conduct pregnancy tests on married women and provide them with unspecified 'follow-up' services."

Children born out of wedlock to Chinese nationals returning to China

81. In relation to children born overseas to Chinese nationals, DFAT gave this advice in 2010:

> "Most provincial and municipal governments have stated that a family planning fee would be imposed for children born out of wedlock. The State Family Planning Commission authorises local governments to establish their own criteria when imposing family planning fees in each jurisdiction. According to a regulation published by the Fujian Government in September 2002, 60 to 100 per cent of the average local income should be imposed for those who give birth to their first child out of wedlock. If the parental annual income is higher than the average level, their actual annual income will be adopted, meaning wealthier parents are charged a higher penalty. Rates have been known to be negotiable in some remote regions." (*DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February 2010)

82. Regarding the effect that marriage may have on liability to pay the penalty, the report notes:

> "The key consideration is the marital status of the parents **prior** to the birth of the child. If a child is conceived out of wedlock, but the parents marry prior to the birth of the child, no social compensation fee is charged. If a mother gives birth to a child out of wedlock, a social compensation fee is likely to be charged, even if the parents subsequently get married.
>
> The Family Planning Commission state that the intention of imposing a fee to unmarried parents who give birth to a child is to encourage marriage. Marriage is required to ensure the lawful rights of the child, such as legal household registration." (DFAT Report No. 1104 – China: RRT Information Request: CHN36059, 12 February 2010). (emphasis in original).

Fines/social compensation fee

83. DFAT has recently consulted the Policy Section of the Fuzhou Family Planning Commission and clarified aspects of the 2002 *Population and Family Planning Regulations* of Fujian Province reporting that:

Article 39(1) of the Regulations (imposing a fee of zero point six to one times the average annual disposable income of urban residents or the net average annual income of the rural residents) refers to circumstances where a child is born out-of-wedlock to parents who are both unmarried at the time of that child's birth.

Article 39(3) (imposing a fee of four to six times those incomes) refers to circumstances where a child is born to a married parent, but where that parent has had the child with a person other than their legal spouse. That is, Article 39(3) should be understood as applying where there has been an "extramarital affair". (DFAT Report No. 1354 – RRT Information Request: CHN39817, 23 January 2012)

84. Statistics for Fujian, from the *Fujian Statistical Yearbook 2010,* give an annual per capita disposable income for the year 2009 for urban residents of 19,577 *yuan* (or $A2,900) and for rural residents of 6,680 *yuan* (or $A989). (www.stats-fj.gov.cn/default.aspx)

85. There is some evidence that in some circumstances the fee may be payable by instalment: *Measures for Administration of Collection of Social Maintenance Fees* (Promulgated by Decree No. 357 of the State Council of the People's Republic of China on August 2, 2002, and effective as of September 1, 2002), National People's Congress (NPC) of the People's Republic of China website http://www.npc.cn/englishnpc/Law/2007-12/14/content_1384253.htm) On the other hand, a pre-census amnesty for payment of the social compensation fee appears to have ended. An article entitled *China starts world's biggest census* dated 1 November 2010 that appeared in the London *Telegraph*, reported that the Chinese Government "said it would lower or waive the hefty penalty fees required for … [children born in violation of the country's one-child policy] to obtain identity cards." The report added that "so far it appears there hasn't been much response to the limited amnesty". It appears that the amnesty was up to a date in November 2010 when the census was being taken. (www.telegraph.co.uk/news/worldnews/asia/china/8101368/China-starts-worlds-biggest-census.html)

Nationality of child and right of entry

86. Article 5 of the *Nationality Law of the People's Republic of China* (adopted at the Third Session of the Fifth National People's Congress, promulgated by Order No. 8 of the Chairman of the Standing Committee of the National People's Congress on and effective as of September 10, 1980) provides:

> "Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality." (www.novexcn.com/nationality.html)

Registration

87. Further, on the subject of registration, DFAT has reported that according to the *Fujian Provincial Population and Family Planning Committee*, "a child 'should' be able to register irrespective of the age of their parents". (*DFAT Report 1210 – RRT Information Request CHN37505*, 12 November 2010)

88. Although with specific reference to Guangxi province, DFAT gave this advice in 2007:

> "According to the official policy, parents wishing to obtain a residency permit for their children in a particular area will generally be subject to the one child policy, regardless of where their children were born. This means that a Chinese person wishing to register their overseas born children would generally be required to pay the stipulated fine. However, a person holding Chinese nationality returning from overseas may be exempted from the one child policy under two circumstances. First, where Chinese students have studied overseas for more than one year, and if their second child is born overseas, they may obtain a residency permit for that second child upon returning to China without having to pay the fine. Second, Chinese who have a right to permanent residency in another country, and still hold their Chinese nationality, may be defined as "Overseas Chinese" If so, they will not be required to pay the fine in order to obtain a residency permit for a second child upon returning to China. All other returning Chinese must pay a fine to register a second child." (*DFAT Report No. 746 – China: RRT Information Request: CHN32483,* 6 December 2007)

89. To be emphasised here is DFAT's 2010 advice noted earlier that most provincial and municipal governments have stated that a family planning fee would be imposed for children born out of wedlock.

Discrimination

90. Information provided to the Tribunal by Dr. Alice de Jonge, senior lecturer in international trade law and Asian business law, Monash University, dated 20 January 2010 is as follows:

> "In more remote villages, social ostracism can have very real human rights impacts on its victims, [including] discrimination in access to basic amenities… In urban contexts, again the individual circumstances of the woman and her child must be considered. Social connections and networks are essential. With them, almost anything is possible. Without access to social supports, life can be very hard indeed to the extent that access to basic amenities such as housing and access to job opportunities can be denied."

"Black" (unregistered) children

91. The UK Home Office *Country of Origin Information Report* dated 24 August 2011, at paragraph 27.06 refers to a report of the Canadian Immigration and Refugee Board dated 27 June 2007:

> "An 11 August 2005 article in Reproductive Health … notes that children born outside of China's family planning regulations may not be registered by the authorities or be 'treated equally,' unless their parents pay a fine... Without registration, 'black children' may not be able to access medical care, education or employment, particularly in urban areas… They may also not have access to other state benefits and services, or be entitled to land allotments… However, according to a 2003 report by France's Commission des Recours des Réfugiés, corrupt family planning officials and direct payments to teachers and doctors may

allow 'black' children to be integrated into society… The professor of International Affairs at the Georgia Institute of Technology similarly notes in his correspondence that '[u]nregistered children [in China] generally can't have much access to state-provided or community-provided benefits including subsidized education. But they may now have increased access on pay as you go basis'."

92. Referring to Guangdong, DFAT said in 2004:

> "As with unmarried mothers, being a child born out of wedlock still attracts some degree of social stigma … Children might be subject to bullying or teasing at school, but are unlikely to suffer serious social disadvantage." *DFAT Report No. 330 – RRT Information Request: CHN16967*, 15 October 2004.

93. In some contrast, Dr. De Jonge has said that "in practical social terms, there is no doubt that unmarried mothers and their children are subjected to many types of social discrimination, harassment and ostracism. Chinese society is still deeply prejudiced against illegitimate children": *Advice of China's Family Planning Law(s) and Regulations with special reference to the position of unmarried mothers*, October 2004.

94. Dr. De Jonge also provided this information dated 15 January 2010:

> "The main risk for a child born out of wedlock is discrimination in the form of being denied access to state-provided benefits and services. This includes education and health services. I would be surprised if such a child had the same 'registration' documents as a state-sanctioned child born to a married couple. If such documents were held by a child returning to China after two or more years in Australia, it is unlikely that any such documents would continue to be recognised. Without current documents, the child would not be able to enrol in a state pre-school or school. In addition, being unable to provide such documents when seeking medical care in a public facility would mean a risk that services would be denied or a hefty charge levied (bit like not being entitled to a medicare card in Australia)."

95. It appears that the position in relation to medical benefits needs to be qualified. In 2007 DFAT reported:

> "Unregistered children do not officially have access to public schools, but can go to private schools, which usually charge higher tuition fees. China does not have a national health insurance system for children, so children being registered or unregistered is not relevant to access to medical services". *DFAT Report 691 – RRT Information Request CHN32173*, 31 August 2007.

Forced abortion or sterilisation

96. The US Department of State *2010 Country Reports on Human Rights Practices*, 8 April 2011 states:

> "National law prohibits the use of physical coercion to compel persons to submit to abortion or sterilization. However, intense pressure to meet birth limitation targets set by government regulations resulted in instances of local family-planning officials using physical coercion to meet government goals. Such practices included the mandatory use of birth control and the abortion of unauthorized pregnancies. In the case of families that already had two children, one parent was often pressured to undergo sterilization." (US Department of State 2011, *2010 Country Reports on Human Rights Practices*, 8 April, 2011 www.state.gov/g/drl/rls/hrrpt/2010/eap/154382.htm)

97. In the same report is this statement:

> "Officials at all levels remained subject to rewards or penalties based on meeting the population goals set by their administrative region. Promotions for local officials depended in part on meeting population targets. Linking job promotion with an official's ability to meet or exceed such targets provided a powerful structural incentive for officials to employ coercive measures to meet population goals. An administrative reform process initiated pilot programs in some localities that sought to remove this linkage for evaluating officials' performance."

98. Article 18 of the Fujian Provincial Government 2002 *Population and Family Planning Regulation of Fujian Province,* adopted by the 33rd Meeting of the Standing Committee of the Ninth Provincial People's Congress on 26 July 2002 provides among other things:

> "The couple that are capable of giving birth to a child should take one of the long-term effective contraceptive measures and accept the examination and inspection of pregnancy and childbirth. Specific measures shall be formulated by the family planning administrative department of the province and submitted to the provincial people's government for approval and then put into practice. Those who have become pregnant in violation of this Regulation should take remedial measure in time. Villagers' committees or the resident's committees or their units should urge them to take *remedial measures* in time" (www.cpirc.org.cn/zcfg/zcfg_detail.asp?id=1705) (emphasis added).

99. According to the US Congressional-Executive Commission on China 2009, *Annual Report 2009*, 10 October 2009, "remedial measures" was used synonymously with "compulsory abortion". At page 156 the report refers to a circular issued by Anxi county government in Fujian that year ordering officials to seek court authorisation to carry out "coercive measures" when "family planning violators" failed to pay fines. The report also notes that authorities in some localities levied social compensation fees at higher levels according to the violator's income and, in some cases, additional fines were imposed on women who resisted official efforts "to 'implement remedial measures' such as abortion". Further in relation to Fujian there was this report in US Department of State 2007, *China: Profile of Asylum Claims and Country Conditions*, Political Asylum Research and Documentation Service website:

> "Consulate General officials visiting Fujian have found that coercion through public and other pressure has been used, but they did not find any cases of physical force employed in connection with abortion or sterilization … In interviews with visa applicants from Fujian, representing a wide cross-section of society, Consulate General Officers have found that many violators of the one-child policy paid fines but found no evidence of forced abortion or property confiscation." [paragraph 99] (www.pards.org/paccc/china_may_2007.doc)

100. At paragraph 28.34 of its report cited earlier, the UK Home Office refers to an article dated 15 February 2009 in the *Times* reporting that "[a]buses of women's reproductive rights, some of which break China's own laws, are provoking outrage as Chinese public opinion wakes up to the persistence of forced abortion, compulsory sterilisation and even infanticide… numerous reports in the Chinese media claim that it still goes on". At paragraph 28.23 the report also refers to a BBC report dated 2 July 2009 of "dozens of baby girls in Southern China" being taken from parents who broke family planning laws and then sold for adoption overseas.

FINDINGS AND REASONS

Summary of claims

101. The applicant claims that if she returns to China she will face the risk of persecution owing to her Christian faith and her having one child born out of wedlock and being pregnant with a second child. She claims that her daughter will suffer as a "black child". (In *Chen Shi Hai v MIMA*, cited above, the High Court essentially acknowledged that the parents' fear is sufficient when a child's age and circumstances mean that the child lacks a subjective fear: at paragraph [4]).

102. On the basis of the applicant's passport, her daughter's birth certificate, the GP's letter provided on the day of the hearing, and the applicant's and her partner's general evidence, the Tribunal makes these findings. The applicant is a national of China. She and her partner are de facto partners. They are parents of the applicant's daughter and the applicant's second, unborn, child. The Tribunal's findings in relation to the applicant's religion and other claims are set out below.

103. On the face of it, the applicant's delay in making the application, the circumstances surrounding the delay, and the reasons the applicant gave for the delay, cast some doubt on her claims to fear persecution in China at least on the ground of her religion. The Tribunal however accepts the applicant's evidence as essentially credible. Putting to one side for the moment the evidence concerning the precise church group that she belonged to in China, the Tribunal considers that the applicant gave a generally consistent account of her activities there and in Australia. Notably, there appeared to the Tribunal to be no attempt to overstate her participation in church activities in China or the fate of her cousin since her cousin was released from custody. The applicant's partner gave consistent corroborative evidence about her church attendance in Australia and her involvement with church leaders here.

104. The applicant's delay has less significance in the context of her daughter's birth. The applicant gave birth about six months before she made the application though obviously must have been aware before then that she was pregnant.

105. Before proceeding, the Tribunal notes that section 91R(3) of the Act in effect requires the Tribunal to disregard the applicant's conduct in Australia unless the applicant satisfies it that she engaged in that conduct otherwise than for the purpose of strengthening her claim to be a refugee. The Tribunal considers that the applicant has sufficiently demonstrated that she genuinely has a Christian faith. The Tribunal records that it is satisfied that she has practised Christianity in Australia because that is her faith, acquired before she come to Australia. The Tribunal is also satisfied that the relationship she has with her partner is genuine and that her pregnancies have been unintended. In the Tribunal's view, it would be unreasonable and unrealistic to conclude that her relationship and the pregnancies demonstrated that her faith was not sincere. This is especially so given the applicant's age and circumstances such as her virtual estrangement from her mother if not from both her parents. Significantly, there is evidence which the Tribunal accepts that she has continued to seek and receive support from her pastors. Further, concerning the applicant's conduct in not marrying, the Tribunal considers that is adequately explained by her age, culture and both her and her partner's family's opposition to the relationship. Given that the applicant's first child was born before she turned 19 years and that she is now pregnant again, even if she and her partner were now

to marry, the complexion of the case would most likely not change dramatically. This is because of the Tribunal's conclusions about the applicant's daughter set out below under the sub-heading "Black child".

106. In summary, accepting the applicant's and her partner's evidence as credible, the Tribunal finds that the applicant is a Christian; that she attended some unregistered churches in China; that she has frequently attended church in Australia; that she and her daughter have been baptised; and that, were she to return to China, she would seek to continue to practise her faith in an unregistered church. The Tribunal also finds that the applicant has a daughter born out of wedlock, born to her when she was below the marriageable age for women in China, and that she is now pregnant with her second child. There was an earlier pregnancy that resulted in miscarriage and it is obviously possible that the current pregnancy may not continue full term.

107. The Tribunal has reservations about the applicant's claims that the church she attended was the Local Church to which, according to relevant country information, the Chinese government has an especially strong negative attitude. The applicant did not refer - or at least did not unequivocally refer - to that church in her application or during her interview with the Department. The written submission provided on the day of the hearing did not either. There was no suggestion that the churches she attended in Australia are connected in some way with the Local Church. On the other hand, the situation was not that the applicant brought up the Local Church at the hearing which, had she done, may have suggested that she was attempting to strengthen her claims. Rather, it was only when prompted by the Tribunal to clarify how the term "local" was being used that she referred clearly to the Local Church. Then, without hesitation, she gave some information about the Local Church. The outcome in this case does not turn on whether or not the Tribunal accepts that she is an adherent of the Local Church but the Tribunal takes into account the chance that the church that the applicant attended in China was connected with the Local Church: see *MIMA v Rajalingam* [1999] FCA 719 at [63]. This does not mean that she would necessarily seek to participate only in Local Church groups in China for she has chosen to attend other Protestant churches in Australia. The Tribunal accepts at least that she would seek to participate in unregistered churches in China.

Religion

108. The submission referred to country information that was broadly consistent with that quoted above. In relation to religion the submission referred to reports concerning numerous provinces other than Fujian although it did cite a 2007 report of the destruction of house churches in two provinces including Fujian. Given the country information, the applicant's claims would be stronger if it was accepted that she was a member of the Local Church in China. But even then, in the Tribunal's view, the Tribunal would not conclude that she has a real chance of being persecuted by reason of religion if she returns to China. The well documented relatively liberal approach of the authorities in Fujian is one factor. While she was in China the applicant did not come to the attention of the authorities, and the circumstances of her departure do not indicate that she was of any, or any significant, interest to them. The main episode involving her cousin, who the evidence indicates was more involved, was relatively serious but occurred some years ago. The evidence concerning the other relatives who went to the UK is limited and does not add substantial support to the applicant's case. The fact that the applicant did not apply for a protection visa until about three years after she arrived in Australia tends to support the view that while she may fear harm in China for reason of her religion there are other, prevailing, reasons for her fear.

109. At this point the Tribunal comments that although the applicant agreed with the delegate that her "true reason" for not wanting to return to China was the situation with her mother, the Tribunal does not consider that she should be taken to mean that the *only* reason was the situation with her mother. Further, regard must be had to the consequences of the situation with the applicant's mother.

110. The Tribunal will soon turn to the issues regarding family planning. Before leaving the subject of religion, the Tribunal refers to a submission on behalf of the applicant that drew on UNHCR Guidelines to the effect that a person with strong religious beliefs or whose religion forbids, say, the use of contraceptives may suffer intolerable mental agony and harm if forced to comply with a law, such as through the use of contraceptives, in order to avoid persecution. The person's act of compliance could be so abhorrent to their beliefs that it would be tantamount to persecution. The Tribunal observes that the applicant herself when discussing her relationship and her "unplanned" pregnancies, and even her concerns about abortion and sterilisation, did not relate these to her religious beliefs sufficiently strongly or otherwise in a way that would lead the Tribunal to conclude that, *for her*, the problem would be that her religious beliefs would be offended. The Tribunal will return to the issue under the sub-hearing "Abortion/sterilisation".

Family planning

111. The Tribunal observes that the applicant and her partner may be able to marry and that they have now both reached what in China is the marriageable age. It is of course not suggested that they should marry if just for the purpose of trying to overcome problems they might face if they returned to China. Marriage may in any event not assist them in that regard: their daughter has already been born out of wedlock and before the applicant reached marriageable age; and there is a second child due to be born this year.

112. The Tribunal considers the obligation to pay a social compensation fee on the basis of the one child that the applicant and her partner have, conscious that if they were to return to China after the birth of their second child, the amount could be significantly higher.

113. It is not clear from the evidence whether the applicant's district would be classified as rural or urban for the purposes of the relevant family planning laws. It is not clear either whether any fine or social compensation fee would be required of the applicant only or of both the applicant and her partner. It does appear that the amount could be 60% of the average annual income of an urban resident or the average annual income of a rural resident or somewhat more than that amount. However the amount is best estimated, the Tribunal accepts that the applicant and her partner, who are currently reliant on the Red Cross, do not have the capacity to pay. The Tribunal also takes into account their age and general circumstances and concludes not only that they do not presently have the capacity to pay but also that, for the reasonably foreseeable future, they would not have the capacity to pay.

114. It is recognised that the applicant and her family evidently managed to put together sufficient funds for her to come to Australia as a student in 2008. The same may be said about her partner. However, the Tribunal accepts as credible the evidence that they gave about their families' negative attitude towards their relationship. The possibility that either of their families would help them pay, if they were financially able to, should therefore reasonably be discounted, in the Tribunal's view. The possibility of payment by instalments does not appear to the Tribunal to alter the situation significantly if at all, and the reports referred to earlier indicate that an amnesty in relation to the fees ceased to be available in late 2010.

Abortion/sterilisation

115. If the applicant were to return to China now there is the additional risk that, carrying a second child, and being still unmarried, the pregnancy would be terminated and she would be sterilised. Even if the applicant's or her partner's family could afford to pay or help pay the social compensation fee, the attitude expressed by some family members, still unaware of the second child, suggests that even the possibility of abortion or sterilisation or both would not move them to assist the couple. The country information tends to indicate that the authorities in Fujian province may be less likely than those in some other parts of the country to employ such coercive measures, but the information is not unequivocal. The information indicates that the pressures on officials are such that coercion may be exercised through imposition of fines, and the level of fines, even if there would be less prospect of physical coercion. Especially at her age and with her lack of family support, the Tribunal considers that the applicant has a well-founded fear of harm in the form of "forced" abortion and sterilisation. That said, the Tribunal notes that by a majority decision of the High Court in *Applicant A*, cited above, it was held in relation to applicants who feared sterilisation under Chinese family planning policies were not members of a particular social group for Convention purposes. It is unnecessary to say more than that there appears to the Tribunal to be nothing in the present case to take it outside the principles stated by the majority of the High Court in that case.

"Black child"

116. The country information indicates that, although the applicant's daughter is by law a Chinese national and so able to enter China, she would be a "black child" and so not be given household registration without payment of the social compensation fee. The delegate essentially considered that payment of the fee was feasible and a reasonable means of obtaining registration. The Tribunal takes a different view of the evidence of the financial and other relevant circumstances of the applicant, her partner and their families. In the Tribunal's view this means that - now and further into the foreseeable future - the applicant's daughter would be denied access at least to educational benefits (medical benefits evidently being a different matter) and may, with the applicant herself, suffer a degree of discrimination at a social level. Although the country information indicates that private education would be available, it also indicates that higher tuition fees are usually charged. In all the circumstances of this case, the Tribunal considers that this means that there is a real chance that for the foreseeable future the applicant's daughter would be denied basic education.

117. In contrast to *Applicant A*, in *Chen Shi Hai v MIMA*, referred to in the submission made on behalf of the applicant, the High Court - presuming persecution in the case of "black children" - found that there could be a particular social group for Convention purposes: those children did not contravene the "one child-policy" but were born in contravention of it; the group could be defined other than by reference to discriminatory treatment or persecution that they feared: at [22]. The Court also said this:

> "Ordinarily, … in the case of children, denial of an opportunity to obtain an education involve[s] such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective": at [29] (per Gleeson CJ, Gaudron, Gummow and Hayne JJ).

118. The Tribunal finds that the applicant's daughter is a member of a particular social group. The Tribunal has reached this conclusion by applying the principles as they were summarised in

Applicant S v MIMA, cited above, at paragraph [36], and having regard to the country information set out above. First, the group is identifiable by a characteristic or attribute common to all members of the group: being born outside family planning regulations. Secondly, the characteristic or attribute common to all members of the group is not the shared fear of persecution: a child is a "black child" irrespective of what persecution may or may not befall him or her (see *Chen Shi Hai* at paragraph [22]). Thirdly, the possession of that characteristic or attribute distinguishes the group from society at large. The country information indicates that "black children" are recognised and distinguished in society. Adverse treatment may facilitate that: see *Chen Shi Hai* at paragraph [23].

119. Having regard to section 91R (1) and (2) of the Act, which contains relevant provisions concerning persecution, the Tribunal makes these findings. The applicant's daughter has a well-founded fear of persecution if she "returns" to China. That persecution, at least in the form of the denial of educational benefits (as a denial of access to basic services, where the denial would affect her capacity to subsist), but especially looking cumulatively at the detriments that would be suffered, would involve serious harm to her and involve systematic and discriminatory conduct. Further, it is her membership of a particular social group, "black children", that would be the essential and significant reason for the persecution.

Relocation

120. Reports indicate the relatively liberal approach of authorities in Fujian (whether in relation to religion or to family planning policy). Nevertheless, the Tribunal has concluded that the applicant's daughter has a well-founded fear of persecution there. Given the existence of the household registration system, and that harm to the applicant's daughter would predominately be the consequence of State law and policy, the Tribunal does not consider that relocation within China is a reasonably available option in this case.

Membership of same family unit

121. As noted earlier, the Tribunal is satisfied that the applicant and her partner are de facto partners and that they are the parents of the applicant's daughter. This means that the applicant and her partner are each members of the same family unit of the applicant's daughter within the meaning of section 5(1) of the Act and regulation 1.12 of the Regulations.

CONCLUSIONS

122. The Tribunal is satisfied that the second named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the second named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria for the visa.

123. The Tribunal is not satisfied that the other applicants are persons to whom Australia has protection obligations. Therefore they do not satisfy the criterion set out in s.36(2)(a) for a protection visa. The Tribunal is satisfied that the first named and third named applicants are the second named applicant's mother and father and so are members of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). As such, the fate of their application depends on the outcome of the second named applicant's application. As the second named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other

applicants will be entitled to a protection visa provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

124. The Tribunal remits the matter for reconsideration with the following directions:

(i) that the second named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and

(ii) that the first and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the second named applicant.